

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

James Hall

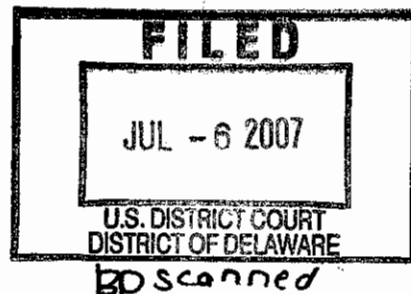
Plaintiff,

✓

DAVID HULMAN, ETAL,

Defendants

C.V. Action # 04-1328-GMS



Plaintiff's Response To Show Cause for NON-DISMISSAL

Come now, Plaintiff James Hall pro se and moves this Honorable Court pursuant to the appropriate Rules of Civil Procedures and all case law authorities.

1) Plaintiff brought this §1983 action claiming defendant were deliberately indifferent to his health and safety this meritorious legally non-frivolous claim has survived countless hurdles and obstacles

2) Specifically Plaintiff has demonstrated a prima facie case with regard to his claim of deliberate indifference to a substantial risk of harm to a inmate. Specifically he has demonstrated a prima facie case with regard to his (4) Essential Elements 1) Substantial Risk of harm

2) official's knowledge of the risk 3) official failure to respond reasonable to the risk (4) Causation and injury

Standard of Review
Memorandum of Law

In exercising our appellate function to determine whether the trial court has abused its discretion in dismissing, or refusing to lift a default, we will be guided by the manner in which the trial court balanced the following factors, which have been enumerated in the earlier cases, (1) The extent of the party's personal responsibility; (2) The prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorneys was willful or in bad faith; (5) The effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim of defense.

① The extent of the party's personal responsibility

- 3 The plaintiff was [Homeless] from February - May of plaintiff contends that he has a responsibility and a DIRE Hardship made it impossible for plaintiff to know that these pretrial motions were pending. Moreover, notices were sent to previous addresses where plaintiff no longer resided in plaintiff's response to defendant's motion answer to plaintiff's cross motion for summary judgment plaintiff specifically requested the Honorable Court to appoint counsel to represent him for the purpose of Discovery/Settlement talks. Id. plaintiff motion/answer to defendant's answer for cross motion for summary judgment Moreover, The Defendant submitted a motion to Stay Discovery Plaintiff is not pointing fingers but he specifically

Requested that counsel be appointed for him
 To alleviate injustice and to level the playing field
 Because plaintiff is not a lawyer and a lawyer at the
 discovery stage would apply the law were needed
 answer briefs Etc. Plaintiff made good faith efforts
 to contact this honorable court explaining his hardship
 and assumed the impression that while explaining that this
 hardship would be noted that the plaintiff was homeless
 and had no return address.

Memorandum of Law

unlike the National Hockey League case where the Supreme
 Court upheld the "Extreme Sanction of dismissal" after noting
 that there had been "flagrant bad faith" on the part of
 the plaintiff as well as "callous disregard" by their counsel
 of their responsibilities. 477 U.S. at 643. 96 S.Ct. at 2781.

- 1) The instant case the plaintiff hasn't acted with "flagrant bad
 faith" as a pro se litigant and friend of the court plaintiff
 hasn't behaved with callous disregard for his responsibilities
 as a pro se plaintiff in the instant pending litigation
 but fell upon hardship.

Memorandum of Law

We reiterate what we have said on numerous occasions
 that dismissals with prejudice or default are drastic sanctions
 *868 termed "Extreme" by the Supreme court National Hockey
League, 477 U.S. at 643. 96 S.Ct. at 2781, and are to
 be reserved for comparable cases

As noted unlike the National Hockey League case, where the Supreme Court upheld the "Extreme sanction of dismissal" after noting that there had been "flagrant bad faith" on part of the plaintiff as well as "calious disregard" by their counsel of their responsibilities. The instant case characterizes events that are non-comparable with the holding in National Hockey League 427 U.S. at 643. 96 S.Ct. at 2781

② Prejudice to the advisory

IV, Pool's v. State Farm Fire and Cas Co. 747 F.2d 865

[FN 4. The interrogatories were never answered nor were objection filed, defence counsel was obligated to file a motion to compel answers and was obligated to file its pretrial statement without the opportunity to review Plaintiff's Pretrial Statement which was due to be filed first. App. 44.4 the court finding that "defendant's inconsiderate lack of cooperation from the plaintiff in areas where the plaintiff should cooperate under the spirit of the Federal Procedure Rules" is supported by the record

- 5.) Plaintiff concedes or contends that the record (Ex Docket Sheet 1) supports that he may have prejudiced defendant due to his hardship (i.e. Being homeless) however this factor weighed alone does not warrant dismissal

Memorandum of law

under the federal rules of civil procedure and the 1983 amendments, the District Court is specifically authorized to impose on an attorney those expenses, including attorney's fees, caused by unjustified failure to comply with discovery orders or pretrial orders. See Fed. R. Civ. P. 16(f), 37(a)(4), 37(b) 37(d) and 37(g) See also 98, U.S.C. § 1977 in the

Poolis Court. 747 F.2d 862 [FN7] The most direct and therefore preferable sanction for the pattern of attorney delay such as that with the District Court encountered. The Court of Appeals, 3rd Cir stated in that case it would be appropriate to impose the excess costs caused by such conduct directly upon the attorney, with an order that such costs are not to be passed on to the client, directly or indirectly. This would avoid compelling an innocent party to bear the brunt of its counsel's dereliction. Dismissal must be a sanction of last, not first resort.

- 6.) Plaintiff being a pro se litigant and friend to this court humbly request that discovery be re-opened so he may be more cooperative in areas he must, but his hardship made it impossible to do so. Plaintiff would want nothing more than to have a opportunity to examine defendant discovery material as they might want the same, in the interest of justice. Plaintiff concedes his previous unwilling practice to defendant due to his hardship [i.e. Being Homeless] However, this factor alone doesn't warrant dismissal. The Plaintiff hasn't acted with bad faith nor has he behaved with colors disregard for his responsibilities as a pro se litigant but explains that the case at hand is not as "Extreme" to warrant dismissal.

③

A History of dilatoriness

- 7.) The plaintiff was Homeless Living from shelter to shelter. Plaintiff made good faith efforts and contacted the prothonotary office of the Court and requested an order by Honorable Judge Sleet granting plaintiff's motion to amend his complaint and formally requesting a change in mailing address and was instructed to put in writing (because she couldn't give me the information over the phone). On another occasion plaintiff requested from the Honorable Court a docket sheet and information concerning C-4 04-1328-GMS and 05-0297-GMS a update on holding, order, ect. in Oct 06' and as formally as 6-6-07 the record reflect no dilatoriness with regard to plaintiff's timely responding/answering Briefs Memorandum orders at one time plaintiff was litigating 2 claims at the same time respectfully stating, the record reflects that plaintiff answered his briefs in a adequate and timely manner and often responded before the due date, for the past 3 years plaintiff has timely and adequately responded to deadlines as he should cooperating under the spirit of the federal procedures rules. and these allegations are also supported by the record. and as a pro se litigant and friend of the court plaintiff didn't have access to legal material he was homeless other resources were not readily available to assist plaintiff in his litigation there is no history considering of plaintiff ignoring time limits and unlike the holding in National Hockey League 437 U.S. at 643. 96. S.Ct. at 2781 and are to be reserved for comparable cases. The instant case at hand is not a "extreme"

whether the attorney's conduct was willful or in bad faith

IN POOL'S 747 F.2d 863, 863^{FN}, where evidence failed to sustain district court's finding counsel's conduct, in failing to observe time limits in pretrial proceedings as "contumacious" although the court concluded that plaintiff's counsel conduct (was) of such a dilatory and contumacious nature to require dismissal, "app. at 5 there is nothing in the record to support the 'contumacious' finding. Nothing in the court's discussion preceding this conclusion is directed toward the willful issue but only toward dilatoriness. There has been *869 no suggestion or indication that counsel's illness during July 1982 and his wife's late pregnancy and false labor at the end of the month did not occur as he represented. As with the instant case there is no indication that plaintiff was not homeless during February or as he represented. The instant case is not as "extreme" unlike in National Hockey League, 427 U.S. at 643, 96 S.Ct. at 2781 and are to be reserved for comparable cases where the plaintiff a pro se litigant and friend of the court with a meritorious and legally non-sarvicious claim and who has represented himself and is not represented by counsel distinguishing this case from National Hockey League 427 U.S. at 643, 96 S.Ct. at 2781, Precluding Dismissal

④ Alternative Sanctions

Memorandum of Law

District court could have imposed on plaintiff's counsel personally cost, including attorney's fees, of preparing motion to compel answers to interrogatories and brief on alternative sanctions, as well as attorney fees on appeal or prior dismissal, all of which were incurred because of dilatoriness of plaintiff's counsel, and thus district court's conclusion that it had no alternative but dismissal because no other sanction was appropriate was erroneous.

Fed. R. Civ. Procedure Rule 16(e) 37(a)(4) 37(b), 37(d) and (37)(g)

under the federal rules of civil procedure and the 1983 Amendments the District Court is specifically authorized to impose on an attorney those expenses, including attorney's fees, caused by unjustified failure to comply with discovery orders and pretrial orders See Fed. R. Civ. Pro. 16(e), 37(a)(4), 37(b) and 37(d)

The most direct and preferable sanction for the pattern of attorney delay such as that which the district court encountered in Poulin v. State Farm Fire and Casualty Co. 747 F.2d 863, would be to impose the excess cost caused by such directly upon the attorney with an order that such are not to be passed on to the client, directly or indirectly. This would avoid compelling an innocent party to bear the brunt of its counsel's dereliction, dismissal must be a sanction of last not first resort.

- 9) The instant case depicts events that are of non comparison plaintiff is a pro se citizen and friend of this court who claim has survived initial stages the harsh stages of litigation plaintiff represent himself should this Honorable court allow plaintiff's meritorious legally non frivolous claim to continue to survive dismissal in the interest of justice and impose attorney fee or sanctions deemed appropriate other than the "extremely harsh penalty of dismissal outlined in National Hockey League v. Winter 427 U.S. at 643, 96 S.Ct. at 2781 and are to be reserved for comparable cases the instant case is not as "extreme"

⑤

Meritoriness of claimMeritoriousness of law

IN considering whether claim or defense appears to be meritorious, for purposes of inquiry as to whether there was abuse of discretion in dismissing for pretrial delays or in refusing to lift a default, Court of appeals does not purport to use summary judgment standards, but rather, claim or defense will be established at Trial, would support recovery by plaintiff or would

constitute complete defense United States v. 55,518.05 in
U.S. currency 708 F.2d at 195; Feliciano v. Reliant Trucking Co. 691
F2d at 657; Farnes v. Bagnasco 687 F.2d at 764

In Poulos v. State Farm Fire and Casualty Co. 747 F.2d 863 at

[FN9] The Defendant suggested to the district court that the most expeditious way to process this litigation was to rule on its motion to dismiss plaintiff's claim as untimely because it was not brought within a year of the loss, as required by the policy.

- ⑩ Again the instant case depicts events that are non-comparable. In the instant case Defendants haven't filed a formal motion to dismiss, Defendants in the instant case vaguely state that the case be dismissed by way of a non-conforming letter motion with no case law to support it's claim moreover plaintiff filed a answered to the nonconforming letter motion demonstrating his hardship (i.e. being homeless) on 6/18/07 it's been established herein now Plaintiff claims have merit in both fact and law and plaintiff's pleading if established at trial would support a finding of deliberate indifference to a substantial risk of harm to a inmate by Defendants p. 9

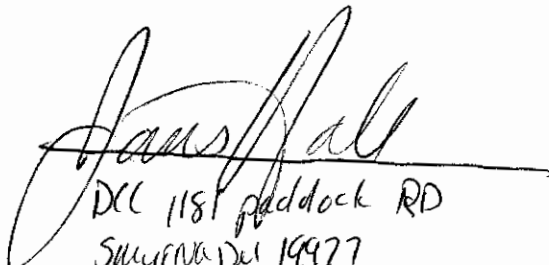
The prima facie case has been established by plaintiff and can't be contested by defendants because they waived that right when they failed to answer plaintiff's written request for admissions when they failed to answer written request for production of documents when they failed to answer plaintiff's written request for interrogatories in his motion answering. Defendants motion to stay discovery plaintiff requested this Honorable Court assist him in obtaining discovery request from defendant - also plaintiff entered a objection to defendant's of the hand / smoke and mirror trick to try and cloud the issues they (Defendants) did use discovery material in there Rule 12(b)(6) Summary Judgment (i.e. plaintiff's dental / medical record / incident report of 6-6-06 ETC) and prohibited plaintiff from engaging in discovery. In there motion for Summary Judgment / Rule 12(b)(6) answering plaintiff cross motion for Summary Judgment it's established there in now plaintiff has demonstrated a prima facie case of Deliberate indifference to a substantial risk of harm to a inmate Defendant have failed to answer plaintiff (1) request for admissions (2) request for interrogatories (3) request of production of documents. Plaintiff has pursued the issue of discovery with Defendants from the originally drafted complaint, to the amended complaint, and currently. The answers to motions on file, Plaintiff Granted Amended Complaint, The Established non-contestable Admission on file (e.g. the pleading) if established at trial would support recovery for plaintiff. Moreover, Defendants have not presented a prima facie factor to be weighed along with the ongoing factor there non-conforming legally frivolous letter motion which has no case law to support it should be denied

Conclusion

12) IT, is well established that the plaintiff being a pro se litigant and a friend of this court with a meritorious legally non frivolous claim, he was successfully defended against defendants for being Deliberately indifferent to his health and safety. By way and this countless hours of litigation having overcome obstacles after obstacles only to prevail on merit. the Disregard of the United States Constitution has mandatory language it clear plaintiff has been deprived of a federally assured ~~right~~ ~~and~~ and ~~seeked~~ in this Honorable Court

wherefore, when the plaintiff is a pro se litigant and seek pleading remedy under Haines v Kerner 404,115 and all case law authorities and is a friend of the court pray this Honorable Court allow his discovery go forward by Rescheduling this matter for discovery Conference and ~~Deny~~ Defendant motion to Dismiss with prejudice

Submitted this 3 day July 07


 DEC 1181 paddock RD
 SUMMIT DEL 19977

Certificate of Service

I, James Hall, hereby certify that I have served a true and correct cop(ies) of the attached: ① Plaintiff Response to Show cause for Non-Dismissal upon the following parties/person (s):

TO: District Attorney Deputy
Mrs Stacey Karmoutakas
Department of Justice 820 N.
French Street, 8th floor corner
offices Bldg, Wilmington, Del 19801

TO: _____

TO: _____

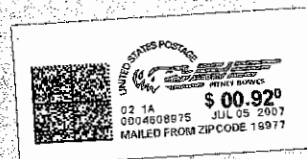
TO: _____

BY PLACING SAME IN A SEALED ENVELOPE and depositing same in the United States Mail at the Delaware Correctional Center, Smyrna, DE 19977, postage to be paid by the Dept. Of Corrections.

On this 3 day of July, 2007

James Hall

UNIT Seminole, Fla. SC
SBI# 0067881 UNIT PT 15-2
DELAWARE CORRECTIONAL CENTER
1181 PADDOCK ROAD
SMYRNA, DE LAWARE 19977



Legal Mail

Office of the Clerk
United States District Court
844 N. King Street, Suite 100
Wilmington, Del
19801